INDIAN OVERSEAS BANK

v.

CHENG LAI GEOK

HIGH COURT, SINGAPORE
GOH PHAI CHENG JC
[SUIT NO. 3734/81]
30 SEPTEMBER 1991

LAND LAW: *Conveyancing - Sale of land by public auction - Land subject to caveats and pending suits - Purchaser decided not to proceed with contract - Whether contract repudiated by purchaser - Whether time is of the essence - Whether vendor has a duty to disclose existence of caveats - Caveat emptor - Rescission - damages - Specific performance - Forfeiture of deposit - Duty to mitigate loss - Conveyancing and Law of Property Act (Cap. 61, 1985 Edn.), s. 26, Pt IV - Land Titles Act, ss. 64(1), 67(1), (2), 108(1).*

The plaintiffs, who were mortgagees of the said property had put up the property for sale by public auction on 2 July 1981. The sale was subject to general and special conditions of sale which were made known to intending buyers. The defendant was the highest bidder for, and declared the purchaser of, the property at the price of $2.6 million. After signing the sale agreement and paying 25% of the purchase price as deposit (the deposit), the defendant informed the plaintiffs on 8 July 1981 that he decided not to proceed with the purchase in view of four existing Caveats and two pending High Court Suits in respect of the property.

On 27 July 1981, the defendant informed the plaintiffs that he was prepared to purchase the property subject to certain terms, *inter alia*, that the plaintiffs show that they have a good title, that the four Caveats would be removed by 2 August 1981 and that the instrument of transfer would be accepted by the relevant authorities.

On 28 July 1981, the plaintiffs informed the defendant that he was not entitled to unilaterally impose any new terms not already stipulated in the auction sale contract and the defendant's terms so stated were not acceptable. Consequently, the defendant did not complete the purchase and on 7 October 1981 the plaintiffs commenced action against the defendant for specific performance and damages for breach of contract in lieu of or in addition to specific performance.

On 28 March 1991 the plaintiffs requested the defendant to complete the purchase by 10 April 1991, failing which the defendant will be deemed to have repudiated the contract. On 11 April 1991 the plaintiffs resold the property at $2.33 million.

The issue before the Court was whether the defendant was entitled to rescind the contract when he discovered the four Caveats and the two pending Suits, and whether the plaintiffs were under a duty to disclose on or before 2 July 1981 the existence of the Caveats and the pending Suits.

Held:

[1] The defendant was not entitled to rescind the contract on the ground that there were four existing Caveats and the two pending Suits. The plaintiffs were exercising their power of sale as mortgagees and the property was sold at a public auction. None of the Caveats were in existence prior to the creation of the mortgage. The property was registered under the Land Titles Act and the defendant would have acquired title to the property freed from all liability on account of the mortgage and other interests subsequent thereto.

[2] The defendant would have acquired a good title from the plaintiffs upon the registration of the instrument of transfer had he completed the purchase of the property at the date fixed for completion. However, if third parties had succeeded in obtaining an order of the Court preventing the registration of the transfer in favour of the defendant, then the defendant could have rescinded the contract after he had given to the plaintiffs a notice to make time the essence of the contract for the completion of the sale and if at the expiry of the said notice, the plaintiffs had failed to remove the order of the Court restraining the registration of the transfer.

[3] As to the question whether the plaintiffs were under a duty to disclose the existence of the Caveats and the pending Suits, the general rule in contracts is *Caveat emptor* and the vendor's duty to disclose only applies to latent defects of title. The Caveats in this case cannot be regarded as latent defects in the title of the property.

[4] With regard to damages, the plaintiffs are not entitled to special damages on the ground that the defendant was the beneficial owner of the property prior to their resale in April 1991 since the plaintiffs resold the property making specific performance of the contract impossible. The plaintiffs are also not entitled to claim damages in accordance with the terms of the contract since they have elected to claim common law damages for the breach of the contract.

[5] Where a purchaser under a contract for the sale of land fails to complete the purchase, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation and proceed to claim damages for breach of contract, both parties being discharged from further performance of the contract; or he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance and the vendor may proceed by action for the above remedies in the alternative and at the trial he will have to elect which remedy to pursue.

[6] An order for specific performance is an equitable remedy. If the plaintiffs fail to obtain specific performance or they elect at the date of the trial to claim damages for breach of contract at common law (as the plaintiffs had done in the instant case), they are only entitled to common law damages and not damages prescribed by the terms of the contract.

[7] In the instant case, the plaintiffs have not acted reasonably in pursuing the remedy of specific performance and are therefore not entitled to claim the expenses incurred by them in respect of the period from 1 August 1981 to 17 May 1991. Even if they are entitled to claim their expenses, they might not succeed in recovering all or any of them since they have a duty to mitigate their loss.

[8] The plaintiffs are also not entitled to recover consequential loss since they decided not to resell the property on or about the time fixed for completion and they failed to act reasonably in pursuing their remedy of specific performance.

[9] Since the plaintiffs had sought specific performance, they had placed the matter in the hands of a Court of equity. In the judgment of the Court, it would not be equitable and conscionable to allow the plaintiffs to forfeit the deposit. The deposit represents 25% of the purchase price and it is clearly out of proportion to the damage which the plaintiffs will suffer as a result of the defendant's breach.

[Judgment for the plaintiffs in the sum of $50,000 with cost.]

Cases referred to:
Stirrup v. Foel Agricultural Cooperative Society Ltd. [1961] 1 WLR 449 ***(cit)***
Pips (Leisure Productions) Ltd. v. Walton 43 P & CR 415 ***(foll)***
Dormer v. Solo Investments Pty. Ltd. [1974] 1 NSWLR 428 ***(foll)***

Tsekos v. Finance Corpn. of Australia Ltd. [1982] 2 NSWLR 347 ***(foll)***
Robinson v. Harman [1848] 1 Ex Ch 850 ***(cit)***
York Glass Co. Ltd. v. Jubb [1925] All ER 255 ***(cit)***
Essex v. Daniell [1875] LR 10 CP 538 ***(cit)***
Laird v. Pin & Anor. [1841] 7 M & W 474 ***(cit)***
Bolton Partners v. Lambert [1889] 41 Ch D 295 ***(cit)***
Dodson v. Downey [1901] 2 Ch 620 ***(cit)***
Lindsay Petroleum Co. v. Hurd [1874] LR 5 PC 221 ***(cit)***
Johnson v. Agnew [1980] AC 380 ***(foll)***
McKenna v. Richey [1950] VLR 360 ***(cit)***
Pollway Ltd. v. Abdullah [1974] 1 WLR 493 ***(dist)***
Stockloser v. Johnson [1954] 1 QB 476 ***(foll)***

Legislation referred to:
Conveyancing and Law of Property Act [Sing], s. 26, Pt IV
Land Titles Act [Sing], ss. 64(1), 67(1), (2), 108(1)
Sale of Goods Act 1893 [UK], s. 15

Other sources referred to:
Chitty on Contracts, 26th Edn., Para 1814 p. 1157
Halsbury's Law of England, 4th Edn., Vol. 42 para. 183

For the plaintiff - Balachandran (Tan Kay Kheng & Patricia Teh with him)
For the defendant - Seah Chwee Lim (Noor Laila with her)

JUDGMENT

Goh Phai Cheng JC:

This is an action brought by the plaintiffs seeking specific performance of an agreement made between the plaintiffs and the defendant on 2 July 1981 for the sale and purchase of the properties known as nos. 27, 29, 31 and 33 Birch Road, Singapore (the subject properties) and damages for breach of contract in lieu of or in addition to specific performance and for other relief. This action was heard on 19 June 1991 and on 22 and 23 July 1991. On the first day of the hearing of this action, the plaintiffs sought and were granted leave to amend their amended statement of claim to abandon the remedy of specific performance and to claim damages for breach of contract subject to the condition that the defendant be compensated in costs occasioned by the amendments. The plaintiffs had resold the subject properties on 11 April 1991 at $2.3 million thus making specific performance of the contract of sale with the defendant impossible.

No evidence was given before me. The parties relied on an agreed bundle of correspondence and documents and an agreed chronology of events for the purposes of this action. The facts which are disclosed in the agreed bundle and the chronology of events are stated in the paragraphs below.

The plaintiffs were at all material times the mortgagees of the subject properties under an instrument of Mortgage No. I/33l94B dated 7 November 1978. The subject properties were comprised in a qualified certificate of title (Vol. 201 Folio 128) issued by the Registrar of Titles on 24 April 1978 under Division 2 of Part I of the Land Titles Act with a caution stating that the said certificate of title is held subject to any interest which may have affected the lands comprised therein at the date of issue thereof. A notification was made in the said Certificate of Title of a mortgage of the subject properties to The Chartered Bank which was registered in the Registry of Deeds. The said entry of the mortgage in favour of The Chartered Bank on the certificate of title was cancelled on 3 January 1991.

In exercise of their power of sale as mortgagees, the plaintiffs caused the subject properties to be put up for sale by public auction on 2 July 1981 by Messrs Cheong Hock Chye & Co. (Pte.) Ltd. (the auctioneers) subject to the special and general conditions of sale which were made known to intending purchasers who were invited to make bids for the subject properties at the auction sale. The general conditions of sale were those conditions of sale known as "The (Revised) Singapore Conditions of Sale". In the event of any inconsistency between the general conditions and the special conditions of sale, the special conditions will prevail.

Clause 1 of the special conditions of sale applicable to the sale (special conditions) required the defendant, immediately after the sale, to pay a deposit of 25% of the purchase price (that is, $650,000) to the auctioneers as agents for the plaintiffs, and to sign the agreement which was attached to the special and general conditions of sale (the agreement). Clause 2 of the special conditions provided that the purchase shall be completed at the office of the plaintiffs' solicitors within one calendar month from the signing of the agreement.

The defendant was the highest bidder for and declared the purchaser of the subject properties at the price of $2.6 million. He signed the agreement immediately after the auction and gave to the auctioneers as agents of the plaintiffs a cheque for the sum of $650,000, being the 25% deposit required by Clause 1 of the special conditions. The defendant countermanded payment of the said cheque and the reasons cited were that there were four Caveats lodged against the subject properties and there were two pending High Court Suits in respect of the subject properties.

By a letter dated 8 July 1981 the defendant's solicitors informed the plaintiffs' solicitors that the defendant decided not to proceed with the purchase in view of the existing Caveats and the pending High Court Suits.

By a letter dated 27 July 1981, the defendant's solicitors informed the plaintiffs' solicitors that the defendant was prepared to purchase the subject properties on the following terms:

(a) that the plaintiffs' solicitors have to show that the plaintiffs have a good title (implied covenant in all conveyance of property cases);

(b) that all the four existing Caveats affecting the properties would be removed by 2 August 1981 (the scheduled date of completion);

(c) that the instrument of transfer is assured by the plaintiffs' solicitors "to be able to be accepted for lodgment at the Land Titles Registry"; and

(d) that if the instrument of transfer is rejected by the Land Titles Registry, the plaintiffs' solicitors undertake as transferor solicitors to refund the full purchase price, costs and disbursements (including stamp fee on transfer, etc.) within two days upon receiving the notice of the defendant's solicitors for the refund, failing which the plaintiffs' solicitors again undertake to pay to the defendant interest on $2.6 million at the rate of 3% above the prevailing prime rates of DBS Bank.

By a letter dated 28 July 1981 the plaintiffs' solicitors informed the defendant's solicitors, *inter alia*, that the defendant was not entitled to unilaterally impose any new terms not already in the auction sale contract and that all the terms contained in the letter dated 27 July 1981 of the defendant's solicitors were unacceptable.

The defendant did not complete the purchase of the subject properties on 2 August 1981. On 7 October 1981 the plaintiffs commenced this action against the defendant for specific performance and damages for breach of contract in lieu of or in addition to specific performance.

On 4 March 1991 the plaintiffs' solicitors informed the defendant's solicitors that the plaintiffs were considering a possible resale of the subject properties and that the plaintiffs reserved their rights in any event. The plaintiffs advertised the subject properties for sale by tender in the *Sunday Times, Business Times and Lianhe ZaoBoa* on 3, 5, 6 and 10 March 1991. The closing date for the tenders was 25 March 1991.

On 28 March 1991 the plaintiffs' solicitors informed the defendant's solicitors that their clients demanded the completion of the sale of the subject properties by 10 April 1991, failing which the plaintiffs will treat the defendant's failure to complete as a repudiation which they shall accept at any time thereafter and without prejudice to their other rights.

The subject properties were resold by the plaintiffs on 11 April 1991 at $2.33 million to Mr. Lim Chor Pian and Mr. Lim Choo Kuan who submitted the highest bid by way of tender.

Issues before the Court

The issue before me is whether the defendant was entitled to rescind the contract for the sale and purchase of the subject properties when he discovered the four Caveats and the two pending Suits. Related to this issue is the question whether the plaintiffs were under a duty to disclose on or before 2 July 1981 the existence of the two pending Suits and the four Caveats which were notified on the land Register.

The Four Caveats and the Two Pending Suits

I shall now state the facts leading to the lodgment of the four Caveats against the subject properties and the facts giving rise to the two pending High Court Suits in some detail because the sequence of events may be important.

Abacus Realty Pte. Ltd. (Abacus), were at all material times the proprietors of the estate in fee simple of the subject properties. They mortgaged the subject properties to the plaintiffs under an Instrument of Mortgage dated 7 November 1978, whereby the mortgagee plaintiffs, at the request of the mortgagor Abacus, agreed to stay or otherwise withhold all execution upon the judgment obtained by the plaintiffs summarily against the seven defendants in Suit 417 of 1978 for approximately $5 million. The mortgage instrument was stamped only for $4,500, being the amount of duty payable on $900,000. However, on 29 September 1981 the mortgage instrument was further stamped by the plaintiffs to cover an aggregate amount of $5,890,000.

By an option in writing dated 22 August 1979 (the first option) Abacus granted to Ho Kok Pui (Ho) an option to purchase the subject properties at the price of $545,000. By another option in writing (the second option) bearing the same date as the first option, Ho granted to Ong Eng Bin and Kassim Elly (Ong and Kassim) an option to purchase the subject properties at the price of $855,000. These two options were duly exercised by the parties concerned on 15 September 1979, but both Ho and Abacus refused or were unable or neglected to complete the sale in favour of Ong and Kassim by way of a tripartite transfer.

On 11 January 1980 Caveat No. CV/33209 was notified on the land-register in respect of the subject properties of an interest claimed by Ong and Kassim as purchasers under an agreement made with Ho of the one part and Ong and Kassim of the other part whereby the said Ho agreed to sell the properties to Ong and Kassim and prohibiting the registration of any instrument made by any person affecting the said properties.

On 13 June 1980 Ong and Kassim commenced Suit No. 1762 of 1980 against Ho and Abacus for specific performance and damages in addition to and in lieu of specific performance.

On 12 November 1980 Caveat No. CV/43425 was notified on the land register against the subject properties of an interest claimed by Ong and Kassim as purchasers under and by virtue of:

(a) an option dated 22 August 1979 granted by Abacus to Ho and exercised by Ho on 15 September 1979; and.

(b) an option dated 22 August 1979 granted by Ho to Ong and Kassim and exercised by Ong and Kassim on 15 September 1979.

On 21 March 1981 Caveat No. CV/48089 was notified on the land register in respect of the subject properties by virtue of a *lis pendens* order dated 16 March 1981 granted by the Court against the subject properties in Suit 1762 of 1980 commenced by Ong and Kassim against Ho and Abacus as the first and second defendants respectively in that Suit.

By a letter dated 27 April 1981 the solicitors of Ong and Kassim informed the plaintiffs that:

(a) Ong and Kassim were the plaintiffs in Suit No. 1762 of 1980 and Ho and Abacus were the first and second defendants respectively in that Suit;

(b) Ong and Kassim were applying for an order for specific performance of an agreement constituted by the exercise of an option for the purchase of the subject properties;

(c) If Ong and Kassim succeeded in their application they would be entitled to require Abacus to transfer the subject properties to them subject to payment to the plaintiffs of what was legally due to the plaintiffs under the mortgage of the subject properties.

The solicitors of Ong and Kassim also stated that they learnt that the plaintiffs would be auctioning the subject properties on 30 April 1981 and asked the plaintiffs to let them know what was the amount due to the plaintiffs so that they could ascertain from their clients whether they were prepared to make payment to the plaintiffs of what was legally due to the plaintiffs so as to enable the plaintiffs to transfer the mortgage to their clients.

By a letter dated 29 April 1981 the solicitors of Ong and Kassim informed the plaintiffs, *inter alia*, that:

(a) an order had been made on the morning of 29 April 1981 by the High Court in Suit No. 1762 of 1980 for specific performance by Abacus of the agreement for sale of the subject properties constituted by the exercise of the two options for the sale thereof;

(b) their clients Ong and Kassim were entitled to call for a redemption of the properties;

(c) the moneys legally secured by the mortgage of the subject properties would be paid on a discharge by the plaintiffs of the said mortgage (the discharge);

(d) if the plaintiffs proceeded with the auction of the properties on 30 April 1981 they did so at their own peril; and

(e) they would tender the discharge to the plaintiffs for execution and the amount secured by the mortgage on hearing from the plaintiff that they would execute the discharge.

On 30 April 1981 the plaintiffs' solicitors informed the solicitors for Ong and Kassim that the plaintiffs were holding the first legal mortgage of the subject properties as well as No. 35 Goodman Road Singapore and as at 28 April 1981 the debt stood at $2,941,984.34.

By a letter dated 23 June 1981 the solicitors of Ong and Kassim gave the plaintiffs' solicitors notice that Ong and Kassim were entitled to redeem the properties by paying to the plaintiffs what was due to the plaintiffs under the Instrument of Mortgage dated 7 November 1978 and that if the plaintiffs refused to permit redemption they would advise Ong and Kassim to commence proceedings for redemption.

On 24 June 1981 an advertisement appeared in the *Straits Times* stating that a mortgagee's sale of the subject properties would be conducted by the auctioneers on 2 July 1981. This advertisement was again repeated in the *Straits Times* of 29 June 1981 and a reminder of the auction sale appeared in the *Straits Times* of 2 July 1981.

On 26 June 1981 the plaintiffs' solicitors informed the solicitors of Ong and Kassim that the sum due and owing as at 30 April 1981 was $2,888,030.14 and that the public auction was fixed on 2 July 1981.

On 29 June 1981 the solicitors of Ong and Kassim served notice on the plaintiffs' solicitors that unless the plaintiffs called off the public auction on 2 July 1981 etc., legal proceedings would be instituted.

On 30 June 1981 Ong and Kassim commenced Suit No. 2180 of 1981 against the plaintiffs seeking an injunction restraining the plaintiffs from auctioning off the properties, especially the public auction scheduled on 2 July 1981; and claiming a total discharge of the mortgage dated 7 November 1987 subject to payment by Ong and Kassim of the sum of $900,000 to the plaintiffs, damages and interest.

On 1 July 1981 Ong and Kassim obtained a *lis pendens* order in Suit No 2180 of 1981 in respect of the subject properties. The *lis pendens* order was served at 12.00 noon of the same day on the plaintiffs who duly acknowledged receipt thereof. On the same day Caveat No. CV/52175 was notified on the land register of an interest claimed by Ong and Kassim in respect of the subject properties by virtue of the said *lis pendens* order of 1 July 1981.

Were the Plaintiffs able to deduce a Good Title in accordance with Clause 3 of the Special Conditions?

The defendant's Counsel contended that the plaintiffs had at no time been able to deduce a good title to the properties to be passed to the defendant and that the plaintiffs were in breach of Clause 3 of the special conditions which reads:

> 3. The title of the property shall be properly deduced. The purchaser shall not call for or require the production or delivery of any deeds or documents not in the vendor's possession nor shall the purchaser investigate or make any objection or requisition in respect thereof.

For the plaintiffs to show a good title, the defendant's Counsel submitted that the purchaser must eventually get a legal interest free from adverse interests and that would also mean that the purchaser is not required to purchase any litigation. He referred to the following *dicta* of Wilberforce J in *Stirrup v. Foel Agricultural Cooperative Society Ltd*. [1961] 1 WLR 449 at p. 454:

> ...The purchaser is entitled to have a good title and is entitled to have his requisitions answered or any defects put in order. The answer to that argument is that a purchaser is entitled to be satisfied that the vendor is seized of the estate which he is purporting to sell, in this case the fee simple, and that the vendor is in the position, without the possibility of dispute or litigation, to pass that fee simple to the purchaser. In my judgment it is quite immaterial to a purchaser whether a particular form, name or description of document is used as long as it shows beyond doubt that his vendor is in possession of the estate and that he is in a position to convey it without any blot or possibility of litigation to the purchaser ...

The defendant's Counsel contended that had the defendant completed the purchase of the subject properties without the plaintiffs having removed the four Caveats on or before 2 August 1981, then the defendant would definitely have been drawn into litigation with Ong and Kassim who lodged the four Caveats. Since there were four Caveats notified on the land-register, the Registrar of Titles (Registrar) would have served a 21-day notice on Ong and Kassim pursuant to s. 108(1) of the Land Titles Act when the instrument of transfer executed by the plaintiffs in favour of the defendant is lodged for registration. The defendant's Counsel further contended that Ong and Kassim would immediately have taken out an originating summons in the High Court to prevent the four Caveats from lapsing, and inevitably they would bring in the defendant and the plaintiffs as the respondents in the originating summons.

It was contended by the defendant's Counsel that what the plaintiffs had at that juncture was at best a doubtful title to the subject properties until the outcome of Suit No. 2180 of 1981 between Ong and Kassim as the plaintiffs and the present plaintiffs (that is, Indian Overseas Bank) as the defendants in that Suit. It would not have been possible for the defendant to persuade any financial institution to grant a loan to the defendant to complete the purchase of the subject properties and any solicitor acting for a financial institution providing financing for the purchase of the subject properties would have insisted on the withdrawal or removal of the four existing Caveats by 2 August 1981.

In my view the defendant was not entitled to rescind the contract for the sale and purchase of the subject properties on the ground that there were four existing Caveats and two pending Suits involving the subject properties. The plaintiffs were exercising their power of sale as mortgagees of the subject properties. The subject properties were sold at a public auction. None of the four Caveats were in point of time prior to the creation of the mortgage of the subject properties in favour of the plaintiffs. The subject properties were registered land under the Land Titles Act. Upon registration of the instrument of transfer executed by the plaintiffs, the defendant would have acquired the title to the subject properties freed from all liability on account of the mortgage and other interests subsequent thereto.

Section 26 of the Conveyancing and Law of Property Act (Cap. 61, 1985 Ed.) states:

> 26(1) A mortgagee exercising the power of sale conferred by this Act may by deed convey the property sold, for such estate or interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage.
>
> (2) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

Part IV of the Conveyancing and Law of Property Act applies to mortgages and charges registered under the Land Titles Act: see s. 64(1) of the Land Titles Act.

Section 67(1) of the Land Titles Act states that the Registrar shall register an instrument of transfer in the prescribed form by a mortgagee made in exercise of a power of sale, without being concerned to inquire whether default has occurred, or whether notice has been given, or whether the power has been properly or regularly exercised. Section 67(2) of that Act states:

(2) Upon registration of such a transfer, the interest of the mortgagor or chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of that mortgage or charge, or on account of any mortgage or charge registered subsequently thereto, and from any lease or other interest registered subsequently thereto, and from any lease or other interest registered subsequently thereto which is not binding on the transferor.

It can be seen from the foregoing, the defendant would have acquired a good title in the subject properties from the plaintiffs upon the registration of the instrument of transfer executed by the plaintiffs had he completed the purchase of the subject properties on the date fixed for completion.

However, if Ong and Kassim had succeeded in obtaining an order of Court to restrain the Registrar from registering the instrument of transfer executed by the plaintiffs in favour of the defendant until the outcome of the two pending Suits after the service upon them by the Registrar of the s. 108 notice, then the defendant could in my view have rescinded the contract for the sale and purchase of the subject properties after he had given to the plaintiffs a notice to make time the essence of the contract for the completion of the sale and purchase of the subject properties and if, at the expiry of the said notice, the plaintiffs failed to remove the order of Court restraining the Registrar from registering the instrument of transfer executed by the plaintiffs in favour of the defendant.

Time is not of the essence of the contract in the present case. Clause 7 of the (Revised) Singapore Conditions of Sale reads:

7. **Completion delayed - interest**

If from any cause whatsoever (other than the wilful default of the vendor) the purchase shall not be completed on the day fixed for completion, the purchaser shall pay to the vendor interest on the balance of the purchase money at the rate of eight per cent per annum, or the vendor may elect to treat the actual day of completion as the day fixed for completion, and in that case shall be entitled to the rents and profits less outgoings (to be apportioned if necessary) up to the actual day of completion in lieu of interest as aforesaid. **The purchaser shall not be entitled to any compensation for the vendor's delay unless contumacious**. The stipulations contained in this clause are without prejudice to the rights under any other of those conditions." (Emphasis added)

Notwithstanding the above-mentioned clause, had the defendant completed his purchase, he could have in my view given to the plaintiffs notice to make time of the essence of the contract. In *Pips (Leisure Productions) Ltd. v. Walton* 43 P & CR 415 at 420, Sir Robert Megarry VC said:

It is now clearly settled that under a contract for the sale of land with a fixed date for completion, the contract has the same meaning in law and in equity, and that it is broken, both at law and in equity, if completion does not take place on that date, even if time has not been made of the essence ...

Suit 2180 of 1981 was commenced by Ong and Kassim against the plaintiffs on 30 June 1981. On 20 July 1981 the plaintiffs (who were the defendants in Suit 2180 of 1981) took out a summons-in-chambers No. 3280/81 to strike out Ong and Kassim's statement of claim on the ground that it disclosed no reasonable cause of action or was otherwise an abuse of the process of the Court. On 17 August 1981 the learned Assistant Registrar made an order that the statement of claim in Suit No. 2180 of 1981 be struck out.

Ong and Kassim appealed against the learned Assistant Registrar's decision and the appeal was heard and dismissed by Wee Chong Jin CJ on 23 February 1982. Ong and Kassim appealed to the Court of Appeal and their appeal was dismissed on 25 November 1982.

Therefore, had the defendant completed the purchase of the subject properties, he could have rescinded the contract after having given a notice to the plaintiffs to make time of the essence of the contract.

Were the Plaintiffs under a Duty to Disclose the Existence of the Four Caveats and the Two Pending Suits?

The defendant's Counsel contended that the plaintiffs had deliberately omitted and failed to disclose the existence of the four Caveats and the two pending Suits which, had the plaintiffs done so, would have adversely affected the defendant's decision to bid for the subject properties at the auction held on 2 July 1981. Were the plaintiffs under a duty to disclose the existence of the four Caveats and the two pending Suits? In my view, the answer is in the negative. The Caveats had been notified on the land register and they were there for the whole world to see. The general rule in contracts for the sale of land is still undoubtedly *Caveat emptor* and a vendor's duty to disclose only applies to latent defects of title: see *Dormer v. Solo Investments Pty. Ltd.* [1974] 1 NSWLR 428 and *Tsekos v. Finance Corpn. of Australia Ltd.* [1982] 2 NSWLR 347. In the present case, the interests claimed under the four Caveats notified on the land register in respect of the subject properties cannot be regarded as latent defects in the title to the subject properties.

Damages

Since the plaintiffs had elected to claim damages for breach of contract on the basis that the defendant by his conduct had acted in repudiatory breach of the contract for sale and purchase of the subject properties which the plaintiffs accepted on or about 11 April 1991 without prejudice of their rights under the contract, the plaintiffs' Counsel contended that his clients are entitled to damages for breach of contract including any special damages suffered by them due to the failure of the defendant to complete the sale. He cited the cases of *Robinson v. Harman* [1848] 1 Ex Ch 850; *York Glass Co. Ltd. v. Jubb* [1925] All ER 255; *Essex v. Daniell* [1875] LR 10 CP 538; *Laird v. Pim & Anor.* [1841] 7 M & W 474 in support of his contention.

The plaintiffs also claim the following as special damages:

I. Expenses which were incurred by them in respect of the subject properties from 1 August 1981 to 17 May 1991:

(a) Insurance premiums	$	32,853.00
(b) Security Guards	$	140,750.00
(c) Property Tax	$	83,436.91
(d) Repairs.	$	2,900.00
(e) Others (*viz*. valuations)	$	41,188.34

II. Expenses incurred in respect of the Resale:

(f) Advertisements	$	5,000.00
(g) Commission	$	23,300.00
(h) Legal fees.	$	6,705.50
		$336,133.75

Counsel for the plaintiffs contended that the plaintiffs are also entitled to the above special damages on the ground that the defendant is the beneficial owner of the subject properties and as such the defendant is under a duty to indemnify the plaintiffs for the expenses incurred by them in respect of the subject properties. In support of their contention the plaintiffs' Counsel referred to *Halsbury's Laws of England* 4th Edn., Vol. 42 para. 183; *Bolton Partners v. Lambert* [1889] 41 Ch D 295; *Dodson v. Downey* [1901] 2 Ch 620. He also submitted that the plaintiffs are entitled to recover property taxes paid in respect of the subject properties from the defendant pursuant to Clauses 6 and 8 of the general conditions of sale. In my view, the plaintiffs are not entitled to the special damages on the ground that the defendant was the beneficial owner of the properties prior to their resale in April 1991 since the plaintiffs resold the properties making specific performance of the contract impossible. The plaintiffs are also not entitled to claim these damages in accordance with the terms of the contract of sale since they have elected to claim common law damages for the breach of contract.

The defendant's Counsel contended that the plaintiffs are not entitled to relief as they had not been reasonably diligent in seeking relief and had also failed to act promptly. The plaintiffs had not taken steps in the ten years between the date fixed for the performance of the contract and the date on which they re-sold the subject properties to rent out the properties to collect rent for their own benefit. The plaintiffs left the properties vacant in the interim period. Instead they added costs and expenses by engaging security guards to watch the vacant premises.

The defendant's Counsel further contended that the plaintiffs took ten years to elect to rescind the contract and that "it is inequitable that they should be allowed to wait and see whether it pays them to rescind or not, for that would be gambling on a certainty at the defendant's expense". In support of their contention the defendant's Counsel cited *Lindsay Petroleum Co. v. Hurd* [1874] LR 5 PC 221.

In my view, the plaintiffs in the present case are entitled to wait until the date of the trial to elect which of the two remedies they wish to pursue. In *Johnson v. Agnew* [1980] AC 380 at p. 392 Lord Wilberforce held that where a purchaser under a contract for the sale and purchase of land fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of contract, both parties being discharged from further performance of the contract; or he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance and the vendor may proceed by action for the above remedies (*viz.* specific performance or damages) in the alternative and at the trial he will however have to elect which remedy to pursue.

I shall now deal with questions relating to the measure of damages.

In *Johnson v. Agnew* [1980] AC 380 at p. 400 Lord Wilberforce said:

> ... The general principle for the assessment of damages is compensatory, that is, that the innocent party is to be placed, so far as money can do so, in the position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages at the date of the breach - a principle recognised and embodied in s. 15 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the Court has power to fix such other date as may be appropriate in the circumstances.
>
> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise

than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v. Earle Vane* [1867] LR 2 QB 275 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v. Haynes* [1875] LR 10 CP 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In *Radford v. De Froberville* [1977] I WLR 1262, where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.

The date fixed for the completion of the purchase of the subject properties by the defendant was 2 August 1981. On 7 October 1981 the plaintiffs commenced the action herein for specific performance by filing a writ of summons with a statement of claim endorsed therein. The defendant delivered a defence on 12 April 1982. Pursuant to an order made by Wee Chong Jin CJ on 15 October 1982, the plaintiffs were to set down the action for trial within 30 days from the date of the order. The plaintiffs did not set the action down for trial until 9 April 1987, that is, almost five years after the order of 15 October 1982. No reasons have been given for the plaintiffs' delay in setting the action down for trial.

In my view the plaintiffs have not acted reasonably in pursuing the remedy of specific performance and therefore the date which was fixed for the completion of the purchase of the properties by the defendant (that is, 2 August 1981) should logically be the date on which damages should be assessed. The plaintiffs are therefore not entitled to claim the expenses incurred by them in respect of the subject properties during the period from 1 August 1981 to 17 May 1991 for insuring and guarding the properties, property tax, repairs, etc. Even if they are entitled to claim these expenses, they might not succeed in recovering all or any of their expenses since they have a duty to mitigate damages and they did not let out the properties during that period.

What then is the measure of damages at the date of the breach of contract (that is, 2 August 1981)? In my view it will be the difference between the price of $2.6 million which the defendant agreed to pay for the subject properties on 2 July 1981 and the market price at the date of completion (that is, 2 August 1981).

The plaintiffs contended that the market price of the subject properties on 2 August 1981 was $2.25 million. In support of their contention they referred me to the valuation report of Messrs Michael Sim & Associates (the valuers) in the agreed bundle which is not disputed by the defendant. The valuers valued the subject properties on 2 August 1981 as $2.25 million.

The defendant's Counsel urged me not to accept the valuers' valuation without making some necessary adjustments for the following reason. The valuers gave the following values for the subject properties on the following dates:

(a) 2 July 1981 (date of contract)	$2.3 million
(b) 11 April 1991 (date of resale the properties)	$2.1 million

Since the contract price of the properties on 2 July 1981 is $2.6 million and that being the market price of the properties on that date, there is therefore a difference of $200,000, or 13%, between the actual price which the properties could fetch on the open market and the valuers' valuation.

The price obtained by the plaintiffs from the open market when the properties were resold on 11 April 1991 was $2.33 million. There is again a difference of $230,000, or 11%, between the market price and the valuers' estimate on that day.

The defendant's Counsel contended that these differences show that the valuers' estimates of the values of the properties on various dates are different from the actual market prices. Therefore, in order to arrive at the market price of the properties on 2 August 1981, the defendant's Counsel urged me to add another 12% (the average of 13% and 11%) to $2.25 million, which is the value arrived at by the valuers for the subject properties on 2 August 1981. If I make an adjustment in the aforesaid manner, then I will arrive at the sum of $2.52 million as the market value of the subject properties on 2 August 1981 and therefore there the diminution in the value of the subject properties from 2 July 1981 to 2 August 1981 will be $80,000.

The plaintiffs Counsel contended that since the defendants agreed to accept the valuers' valuation report and did not challenge the contents of that report, the defendants are not entitled to dispute the valuations made by the valuers.

It is obvious that the values arrived at by the valuers for the subject properties for the different dates set out in their report are not the true market values of the properties on those dates. If I reject the contention of the defendant's Counsel and accept the values arrived at by the valuers for the subject properties on the date of the contract of sale and the date of the breach, then it is only logical for me to take the difference between the values arrived at by the valuers for the subject properties on 2 August 1981 and on 2 July 1981 respectively in order to determine the loss suffered by the plaintiffs on the date fixed for the completion the sale of the properties.

The valuers give the following values for the subject properties on the following dates in their report:

(a) 2 July 1981 (date fixed for completion)	$2,300,000
(b) 2 August 1981 (date of breach)	$2,250,000
	$ 50,000

As it can be seen from the above, the valuers assessed the diminution in value of the subject properties during the period of one month from 2 July to 2 August 1981 as $50,000. I therefore assess the plaintiffs' loss as at the date fixed for the completion of the sale of the properties as $50,000.

Counsel for the plaintiffs referred me to *Chitty on Contracts,* 26th Edn., at para. 1814 on p. 1157 where the editors citing *Laird v. Pim* state:

Where the purchaser of land fails to complete, the normal measure of damages is the contract price less the market price at the time for completion, **plus any consequential expenses and loss**" (bold added by me for emphasis).

It can be seen from the above that the plaintiffs are entitled to any consequential expenses and loss. Since the plaintiffs decided not to resell the subject properties on or about the time fixed for completion and they failed to act reasonably in the purSuit of the remedy of specific performance, I am of the view that the plaintiffs are not entitled to claim any consequential expense or loss. There was no consequential expense or loss on the date at which damages are to be measured.

The plaintiffs also seek a declaration that they are entitled to the deposit of $650,000, which the defendant was required by Clause 1 of the special conditions to pay to the auctioneers as agents of the plaintiffs immediately after the signing of the contract and an order that the

defendant pays to the plaintiffs the said deposit and interest thereon at such rate and for such period as the Court shall think just. The plaintiffs' Counsel contended that the said deposit is liable to forfeiture under Clause 30 of the (Revised) Singapore Conditions of Sale which reads:

> **Vendor's rights on purchaser's breach.**
>
> 30. If the purchaser shall fail to comply with these or the special conditions of contract, the vendor shall be at liberty (after ten days' written notice to the purchaser or his solicitor) to treat the deposit as forfeited and without tendering an assurance to resell the property by public auction or private contract subject to such conditions and generally in such manner as he may think fit with power to vary or rescind any contract for sale buy in at any auction and resell and the deficiency in price (if any) arising on sale and all expenses of and incident to a resale or attempted resale shall be made good and paid by the purchaser and be recoverable by the vendor as liquidated damages, the purchaser receiving credit for the deposit, but any increase of price on a resale shall belong to the vendor.

The terms of this clause are clear and unambiguous. The plaintiffs are entitled to forfeit the deposit paid by the defendant towards the purchase of the subject properties. In the event the plaintiffs resell the properties and wish to claim any deficiency in price arising from sale and all expenses of and incidental to the resale the plaintiffs must give the purchasers credit for the deposit.

I must stress that this clause provides for damages payable to the vendor which the parties to the contract agree as the loss suffered by the vendor in the event of a breach of contract by the purchaser. If the plaintiffs claim damages pursuant to such a clause for the defendant's breach of contract, then they are not entitled to claim common law damages. They simply cannot claim both contractual and common law damages. In our present case, the plaintiffs decided to seek an order for specific performance or damages in lieu of or in addition to specific performance when the defendant failed to complete the purchase on the date fixed for completion. What the plaintiffs were in fact saying is:

> I don't accept your repudiation of the contract but am willing to perform my part of the contract and insist upon your performing your part - but if I cannot successfully insist on your performing your part, I will accept the repudiation and ask for damages:

per O'Bryan J in *McKenna v. Richey* [l950] VLR 360 at p. 372.

An order for specific performance is an equitable remedy. A plaintiff who seeks specific performance runs the risk of not obtaining the order. If the plaintiffs fail to obtain specific performance or they elect at the date of the trial to claim damages for breach of contract at common law (as the plaintiffs have done so in this case), they are only entitled to common law damages and not damages prescribed by the terms of the contract of sale.

The plaintiffs also relied on *Pollway Ltd. v. Abdullah* [1974] 1 WLR 493 in support of their contention that they are entitled to the deposit even though payment on the cheque had been countermanded. In my view the *Pollway Ltd's* case can be distinguished from our present case on its facts. In that case, the vendors and the auctioneers sued the purchaser upon the cheque which the purchaser had issued to the auctioneers as agent for the vendors as the deposit for the purchase of the property. The purchaser stopped payment on the cheque and refused to proceed with the sale. The Court of Appeal held that the auctioneers were entitled to recover on the cheque as there was consideration moving from the auctioneers. The consideration for the contract between the purchaser as drawer of the cheque and the auctioneers as named payees was either the auctioneers' warranty of their authority

to receive the cheque as named payees in diminution of his obligation to pay the full purchase price to the vendors, or its acceptance by the auctioneers in place of the legal tender by means of which the purchaser was obliged to pay the deposit. In our present case the plaintiffs did not sue on the cheque issued by the defendant. They sued for specific performance whereas the plaintiff in the *Pollway's* case sued on the cheque. I must also add that in our present case the plaintiffs' right to sue on the dishonoured cheque is now time barred and they have therefore lost their right to sue on the cheque.

Another reason for rejecting the plaintiffs' claim to the said sum of $650,000 is that since the plaintiff sought specific performance on the contract, they had placed the matter in the hands of a Court of equity and the subsequent control of the matter would be exercised according to equitable principles. In *Johnson v. Agnew* (*supra*) at p. 399 Lord Wilberforce said:

> There is one final point, on this part of the case, on which I should make a brief observation. Once the matter has been placed in the hands of a Court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles ...

In my view, it would be inequitable and unconscionable to allow the plaintiffs to forfeit the said sum of $650,000. It is in effect a penalty and not a genuine pre-estimate of the damages which the plaintiffs would suffer as a result of the defendant's breach of contract. The said sum of $650,000 represents 25% of the purchase price of the subject properties and it is clearly out of proportion to the damage which the plaintiffs will suffer as a result of the defendant's failure to complete the purchase of the properties. In our present case, the contract provides for an extremely short period of one calendar month for the completion of the purchase. No one in his right mind would have expected the subject properties to lose its value by 25% in such a short period. In fact, the valuers' report shows that the dimunition in the value of the subject properties during that brief period of one month is $50,000. Even if the valuers are wrong, the diminution in the value of the properties during that brief period of one month cannot be any where in the region of $650,000.

In *Stockloser v. Johnson* [1954] 1 QB 476 Denning LJ at p. 480 said:

> ... It seems to me that the cases show the law to this:
>
> (1) **When there is no forfeiture clause** ...
>
> (2) **But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause),** then the buyer who is in default cannot recover the money at all. He may, however, have a remedy in equity, for despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the Court thinks fit. That, is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* [1916] 1 AC 275, where the Board consisted of a strong three Viscount Haldan, Lord Parker and Lord Sumner.
>
> The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell LJ has said about it, differing herein from the view of Romer LJ. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and secondly, it must be unconscionable for the seller to retain the money...

Accordingly for the reasons given above, I am of the view that the plaintiffs are not entitled to claim the sum of $650,000 from the defendant and I award the plaintiffs the sum of $50,000 as damages for the defendant's breach of contract. Judgment is entered for the plaintiffs in the sum of $50,000 with costs.

I am not awarding to the plaintiffs interest on the said sum of $50,000. Interest is awarded at the discretion of this Court. Having regard to all the circumstances leading to the sale of the subject properties and to the conduct of the plaintiffs in the pursuit of the remedy for specific performance. I do not think it is appropriate in this case to award any interest on the said sum for the period from the date of the issue of the writ of summons till the date of judgment.

Also found at [1992] 1 CLJ 296